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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1023

A. J. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, DULY AUTHORIZED REPRESENTATIVE OF JAMES FOSTER AND OTHERS, PETITIONER

v.

THE UNION TERMINAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of administering and enforcing the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat.

1060, 29 U. S. C., Supp. V, § 201 *et seq.*). The petition for a writ of certiorari in this case presents questions of interpretation and rights and liabilities under the Act which are of public interest and importance. Accordingly, the Administrator submits this memorandum, as *amicus curiae*, to urge that the petition for a writ of certiorari be granted.

OPINIONS BELOW

The written opinion of the District Court (R. 281–290) is reported in 33 F. Supp. 244; the oral opinion, findings of fact, and conclusions of law of the District Court (R. 276–281) are not reported. The opinions of the Circuit Court of Appeals (R. 301–303) are reported in 118 F. (2d) 328.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 4, 1941 (R. 304). A petition for a rehearing was filed on March 24, 1941 (R. 305), and was denied on April 2, 1941 (R. 310). The petition for a writ of certiorari was filed on May 5, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Immediately prior to the effective date of the Fair Labor Standards Act, respondent Terminal Company inaugurated the so-called "accounting and guarantee" system of compensating its Red Cap porter employees for their services. Under

this system, each Red Cap was required to report daily to the Terminal Company the amount of tips received by him from passengers, and the Terminal Company paid to the Red Cap only the difference, if any, between the amount so reported and the minimum wage provided by the Act. The question is whether the Terminal Company, through the adoption of this system, complied with its obligation under Section 6 of the Act to pay to its employees a specified minimum wage.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V, § 201 *et seq.*, appear in Appendix A, *infra*, pp. 15–16.

STATEMENT

This suit was instituted under Section 16 (b) of the Fair Labor Standards Act by a duly designated representative of certain Red Cap porter employees (hereinafter called "Red Caps") of the respondent, The Union Terminal Company (hereinafter called "Terminal Company"), to recover the amount of unpaid minimum wages alleged to be due to the Red Caps from the Terminal Company under the provisions of Section 6 of the Act, for the period from October 24, 1938, through March 6, 1940, together with liquidated damages and a reasonable attorney's fee (R. 22–38). The case was tried on an agreed statement of facts (R. 118–196, 215–274) and testimony (R. 196–212).

The pertinent facts may be summarized as follows:

On October 22, 1938, the Terminal Company served on each Red Cap employed by it the following letter (R. 127–128):

> DALLAS, TEXAS, *October 22, 1938.*
>
> To: Red Caps, The Union Terminal Company.
>
> In view of the requirements of the Fair Labor Standards Acts, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amount received by you as tips or remuneration for such services.
>
> The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.
>
> You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.
>
> All the matters above referred to are subject to the right of the carrier to determine from time to time the number and

identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

THE UNION TERMINAL COMPANY,
By MURRELL L. BUCKNER,
Vice-President & Gen. Manager.

Although the Red Caps promptly protested the terms of this notice by their duly authorized representative (R. 128–130), the system of compensation outlined in the notice was put into effect. For the period from October 24, 1938, to February 28, 1939, each Red Cap was required to file daily time slips, showing the hours worked and the tips collected during the day. For the period from March 1, 1939, to October 15, 1939, the Red Caps were required to report only the hours worked each day; unless reported to the contrary, the Terminal Company assumed that each Red Cap collected in tips an amount equivalent to the number of hours worked by him multiplied by 25 cents, the hourly minimum wage. During this period from March 1, 1939, to October 15, 1939, each Red Cap collected in tips during each work period an amount equal to or in excess of the minimum wage. During the period from October 16, 1939, through March 6, 1940, the Company reverted to the system of having the Red Caps make daily reports of both tips collected and hours worked (R. 130–131).

During the entire period covered by the complaint, October 24, 1938 to March 6, 1940, the Terminal Company stood ready to and did pay to each Red Cap, for each work period during which the amount of tips collected by the Red Cap amounted to less than the minimum wage, an amount equal to the difference between the tips collected and the minimum wage (R. 131–132).[1] The total minimum wages to which the Red Caps were entitled under the Act during this period amounted to $40,960.83. Of this amount, the total actually received by the Red Caps directly from the Terminal Company amounted to only $2,333.84. The remainder, $38,626.99, was received by the Red Caps from passengers in the form of tips (R. 29–37, 124).

The District Court held that the tips received by the Red Caps from passengers did not constitute wages paid to them by the Terminal Company (R. 286, 289, 290). Accordingly, it rendered judgment for the petitioner in the sum of $77,753.98, representing unpaid wages of $38,626.99, an equal amount as liquidated damages, and $500 as an attorney's fee, all as provided by Section 16 (b) of the Act (R. 39–41). The Circuit Court of Appeals reversed (R. 302, 304).

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[1] During the period from October 24, 1938, through October 23, 1939, the hourly minimum wage for Red Caps under the Act was 25 cents. For the period from October 24, 1939, through March 6, 1940, the hourly minimum wage under the Act was 30 cents per hour.

ARGUMENT

The court below decided the present case on the authority of its decision in *Williams* v. *Jacksonville Terminal Co.*, 118 F. (2d) 324, with which the present case was argued. The rationale of decision in both cases is that, although tips received by Red Caps prior to the effective date of the Act were the property of the Red Caps, after the effective date of the Act, and by virtue of its provisions, the tips became the property of the Terminal Company. This result, the court below held, followed irrespective of whether the Red Caps agreed that the tips should be the property of the Terminal Company and irrespective of the intention of the passengers paying the tips. The court concluded that since the tip money was money of the Terminal Company, the Act was complied with when the Terminal Company allowed the Red Caps to keep their tips and paid to them any difference between the tips and the minimum wage.

1. This decision presents a question of substantial public importance in the interpretation of the Fair Labor Standards Act which has not been, but should be, decided by this Court. Ever since the effective date of the Act the situation of the Red Caps has been a matter of continuing administrative investigation and concern. The history of the problem is fully summarized in a report, dated November 30, 1940, from the Administrator of the Wage and Hour Division to Senator Thomas,

Chairman of the Senate Committee on Education and Labor, on Senate Resolution 325, 76th Congress, 3d Session. This report, which was made in response to a request by Senator Thomas and is part of the committee files on Senate Resolution 325 (see S. Rep. No. 260, 77th Cong., 1st Sess.), is printed as Appendix B to this brief, *infra*, pp. 17–30.

It appears from this report that the "accounting and guarantee" system which is involved in this case was put into effect, on and after the effective date of the Act, in practically all railroad stations in the United States.[2] From the beginning it was a source of dissatisfaction, and so many complaints were filed with the Administrator that investigations were begun at various terminals and a public hearing was held by the Administrator (see Appendix B, *infra*, pp. 18–21). The result has been collateral regulation of the "accounting and guarantee" system within the limited powers conferred upon the Administrator by the Act,[3] and the insti-

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[2] According to the findings of the Interstate Commerce Commission, there are more than 4,000 Red Caps employed in cities having a population of over 100,000. See *Ex Parte No. 72* (Sub-No. 1), 229 I. C. C. 410, 411. Almost all of these Red Caps, as well as the several thousand employed in smaller communities, were subject to the "accounting and guarantee" system.

[3] See Notice of Hearing by the Administrator on records to be kept regarding Red Caps, published June 7, 1939, 4 F. R. 2306–2307; and amended regulations on records to be kept regarding Red Caps (fourth proviso), published on October 14, 1939, 4 F. R. 4252.

tution by the Administrator of two actions under Section 17 of the Act.[4] In addition, numerous civil actions, similar to the present one, have been instituted by or on behalf of the Red Caps under Section 16 (b) of the Act.[5]

The question has also received the attention of Congress. During the Third Session of the

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[4] In *Fleming* v. *Cincinnati Union Terminal Co., Inc.* (S. D. Ohio), the complaint charges the defendant with failure to pay the minimum wages and with keeping reports of tips received by Red Caps in amounts equal to the minimum wage, despite knowledge that the Red Caps received lesser sums. After issue was joined and depositions were taken and filed on behalf of the Administrator, defendant abandoned the accounting and guarantee system, and the District Court dismissed the complaint on the ground of mootness. This judgment was reversed by the Circuit Court of Appeals for the Sixth Circuit, 117 F. (2d) 1012, which remanded the case for trial. The case has not yet been tried.

In *Fleming* v. *The Cleveland Union Terminal Company* (N. D. Ohio) the complaint makes charges similar to those against the Cincinnati Terminal; issue has been joined and the case has been assigned for trial on June 16, 1941.

[5] Most of these cases are cited on pages 13 and 14 of the petition for a writ of certiorari in the case at bar. The United States intervened in *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434 (W. D. Mo.), to defend the constitutionality of the Act, but the court did not find it necessary to rule upon that issue. The Administrator filed briefs as *amicus curiae* in the present case and in the *Williams* case in the Circuit Court of Appeals for the Fifth Circuit, and in *Townsend* v. *New York Central Railroad Co.* (N. D. Ill., E. D.), which has been tried and is awaiting decision. The latter case also involves the question of whether the Red Caps reported the receipt of larger sums than they actually received as tips because threatened with discharge or other discrimination if they failed to do so.

Seventy-sixth Congress, Senator Thomas, Chairman of the Committee on Education and Labor, introduced Senate Resolution 325, which directed the Administrator to undertake an immediate inquiry into the wages, hours, and other conditions of employment of Red Caps in view of the minimum wage requirements of the Fair Labor Standards Act, and to report to the Senate the extent to which the letter and spirit of the Act is being violated, if at all, the extent of permissible regulation under the Act in its present form, and what legislation, if any, is needed for further regulation. Although no action was taken on this Resolution, a substantially identical resolution was introduced in the present session of Congress (S. Res. 105), was favorably reported to the Senate on May 5, 1941, by the Committee on Education and Labor (S. Rep. 260, 77th Cong., 1st Sess.), and was enacted by the Senate, with an amendment not here material, on May 15, 1941. 87 Cong. Rec. (advance sheets), No. 91, p. 4209.

In view of the long-continued administrative concern with the problem, the evident interest of Congress in its solution, and the large number of pending suits which involve the same issue as that here presented, the importance of a determinative decision of this case by this Court seems manifest.

2. The decision of the court below is, we believe, wrong as a matter of statutory interpretation, and the principle which it establishes—that tips given to employees may be made the property of the em-

ployer irrespective of consent by the employees and irrespective of the intention of the persons giving the tips—may be of wide application in other fields where the tipping of employees is customary.

The court below recognized in *Williams* v. *Jacksonville Terminal Co.,* 118 F. (2d) 324, upon the authority of which this case was decided, that prior to the effective date of the Act, tips received by the Red Caps belonged to them and not to the Terminal Company. But it held that the Act operated to change ownership of the tips, irrespective of the consent of the Red Caps. This conclusion we believe to be unsound. There is no provision in the Act which purports, or which by necessary operation serves, to deprive any employee of property which he would otherwise own. If tips were the property of the Red Caps before the Act, the Act alone could not make them the property of the Terminal Company.

The court below relied on the fact that the Act imposed on the Terminal Company a duty to pay for services rendered and that the tips received by the Red Caps were compensation for those very services. But the duty imposed by the Act upon the Terminal Company to pay wages to the Red Caps is not discharged by permitting the Red Caps to retain the tips they receive from passengers unless the tips are the property of the Terminal Company. And the mere assertion of ownership by the Terminal Company does not make the tips its property, where the passenger intends the

tip to be the property of the Red Cap and where the Red Cap does not consent that the tip shall belong to his employer.[6]

The Act itself lends no support to the view that an employer is legally entitled to the ownership of tips received by his employees and may treat such tips as wages for the purpose of Section 6. As the District Court observed (R. 290), the Congress was familiar with the practice of tipping and in several statutes had specifically dealt with that problem.[7] Yet when it came to prescribing in Section 3 (m) of the Act the items for which the employer could claim credit in computing wages, no mention was made of tips.

We believe it plain, then, that apart from an agreement between the Red Caps and the Terminal Company—and the court below disposed of the case on the assumption that there was no agreement on the accounting and guarantee system because of the prompt protest by the Red Caps—the tips given to the Red Caps were their property and never became the property of the

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[6] In occupations where tipping is customary, the gratuities received by an employee from patrons of the employer have been held to be the property of the employee, not of the employer. *Polites* v. *Barlin*, 149 Ky. 376, 149 S. W. 828; *Zappas* v. *Roumeliote*, 156 Iowa 709, 137 N. W. 935; see also American Law Institute, *Restatement of the Law of Agency*, pp. 871–872.

[7] See Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902 (13); Railroad Retirement Act, 45 U. S. C. § 228a (h).

Terminal Company. If this be so, it follows that the action of the Terminal Company in allowing the Red Caps to keep their property did not constitute the payment of wages within the meaning of Section 6 of the Act.

The same conclusion follows even if it be held that the conduct of the Red Caps in continuing their employment subsequent to the Terminal Company's notice of October 22, 1938, resulted in an agreement by the Red Caps to the terms of the "accounting and guarantee" system.[8] That agreement could not prevent the tips, when given, from becoming the property of the Red Caps in the first instance, for the passengers who gave the tips were not made aware of the agreement and consequently still intended their gratuities to belong to the Red Caps. Accordingly, when given to the Red Caps, the tip money became their property, even though they were under a contractual obligation to account to the Terminal Company for the amount received. Compare the decisions cited in note 6, *supra*. Since the tips became the property of the Red Caps when given, the accounting and guarantee system amounted at most to an agreement whereby the

[8] One of the other important issues in this case is whether, in view of the provisions of the Railway Labor Act, a carrier may unilaterally and without conference with the representative of its employees change the terms of employment, and whether, if it does so, the employees' continuance at work under protest and failure to strike can be deemed an acceptance of the new terms of employment.

Red Caps turned over some of their own property to their employer and received that property back from the employer as "wages." This is not, we submit, a compliance with the Act. The Act requires the actual payment of the minimum wage, not an agreement that the employer will pay the minimum wage provided that the employee gives to the employer, not only his services, but some of his property as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

RICHARD H. DEMUTH,
Special Assistant to the Attorney General.

GERALD D. REILLY, *Solicitor,*
C. E. RHETTS, *Associate Solicitor,*
IRVING J. LEVY, *Assistant Solicitor,*
JOHN E. SKILLING, *Attorney,*
United States Department of Labor.